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IN THE

Supreme Court of the United States

ANTHONY CHARLES THOMAS
Petitioner

v.

STATE OF ALABAMA
Respondent

On Petition for a Writ of Certiorari
to the Supreme Court of Alabama

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the conduct of a police officer in detaining and searching the Petitioner violate Amendment IV to the United States Constitution?

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Anthony Charles Thomas (Thomas) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The order of the Alabama Court of Criminal Appeals (App., *infra*, 13-21) is unreported. The order of the Alabama Supreme Court (App., *infra*, 22) is unreported.

JURISDICTION

The Alabama Court of Criminal Appeals affirmed Thomas's conviction on March 15, 2002, (App., *infra*, 13) and overruled his application for rehearing on April 5, 2002. Thomas then timely Petitioned the Alabama Supreme Court for certiorari review. A writ of certiorari was issued by that court on June 21, 2002. On December 6, 2002 the Alabama Supreme Court entered a judgment quashing the writ. (App., *infra*, 22) The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const., Amend. IV.

STATEMENT OF THE CASE

In September of 1998, Dothan Police Officer Kenny Horn and other officers were patrolling on foot in Dothan, Alabama, near an area known for high drug activity. R 29-30.[1] During their patrol, the officers encountered several men who were standing at the front of a house. *Id.* One of the men was Petitioner Anthony Charles Thomas. Horn said he had previously received complaints about drug activity at a nearby intersection. However, Horn had received no complaints about drug activity on this particular date, nor about the house where the men were standing, nor concerning Thomas. R 36-37. Horn admitted it would not be unusual for people to "hang out" in front of a house in a neighborhood. R 36.

Horn noticed Thomas moving something around in his mouth. Horn said that based upon his training and experience in narcotics, he knows that people who use or have crack-cocaine often will hide it in their mouths. *Id.* However, he acknowledged that Thomas could have had any number of things in his mouth. Horn admitted that he himself sometimes walks around with candy, chewing gum, breath mints and cough drops in his mouth. R 38-39. As Horn approached, Thomas attempted to walk away. R 31. Horn asked Thomas to stop and open his mouth. Horn said, "When I started talking to him, he was looking away and manipulating something around in his mouth, and then, he tried to walk away from me. . ." R 38. When Thomas tried to walk away, Horn put his hands on Thomas to detain him. R 39. Thomas then spit several pieces of crack cocaine into his hand and threw them against the wall of the house. R 31-32. Horn recovered the cocaine. R 33.

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[1] The designation "R.__" refers to the Reporter's Transcript of the trial below.

STAGE IN PROCEEDINGS WHEN FEDERAL QUESTION RAISED

At his trial in the Circuit Court of Houston County, Alabama Thomas filed a written motion to suppress the cocaine. C 37.[2] A hearing was held on this motion. R 3, 29. During that hearing, Thomas argued that police had no reasonable suspicion to detain him and search his mouth. R 43. Thomas argued that pursuant to *Terry v. Ohio*, 392 U.S. 1 (1968), Officer Horn lacked the necessary quantum of suspicion necessary to detain him. R 44.[3] Thomas also cited *Brown v. Texas*, 443 U.S. 47 (1979) as authority that a person's mere presence in a high-crime neighborhood does not, of itself, provide a reasonable suspicion. R 44-45. The trial court held that Officer Horn had probable cause to search Thomas, stating:

> We have got three elements here. One is the suspicious [sic] to the police action of the defendant concerning having something in his mouth. But that alone could not do it, because it could have been a cough drop. Number two, a high crime area. That alone would not do it. But I think with the looking away and turning away, in addition to all that, that would establish probable cause. Otherwise, we are authorizing drug dealers to hold cocaine in their mouth, because you are immune if you have it in your mouth.

R 45-46.

On direct appeal to the Alabama Court of Criminal Appeals, Thomas argued that Horn had no authority to stop him, pursuant to *Terry v. Ohio, supra*. Appeal Brief at 4. Thomas also argued that on the authority of *Florida v. Royer*, 460 U.S. 491 (1983), persons approached by police have the right to ignore the police and go on their way

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2 The designation "C.__" refers to the Clerk's Record of the trial below.

3 During argument on the motion to suppress, counsel for Thomas inadvertently referred to *Terry v. Ohio* as *"Terry v. United States."*

unrestrained, unless the police have reasonable suspicions justifying detention. Appeal Brief at 5, 8. The Alabama Court of Criminal Appeals agreed that "the individual has a right to ignore the police and go about his business." (App., *infra*, 17) (citing *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) and *Florida v. Royer, supra* at 498. That court said that because Thomas was "manipulating something around in his mouth, and because Officer Horn knew from his experience as a police officer that crack cocaine is often hidden in the mouth, and because they were in a high drug crime area" the officer was not required to ignore the relevant characteristics of the location in determining whether the circumstances were sufficiently suspicious to warrant further investigation. *Id.* (citing *Wardlow, supra.*) The court said that since Officer Horn had a reasonable suspicion, he was warranted in detaining Thomas to confirm or deny his suspicions. *Id.* (citing *Terry v. Ohio, supra* and *United States v. Sokolow*, 490 U.S. 1 (1989)). The Court of Criminal Appeals acknowledged that

> [A] policeman who lacks probable cause but whose 'observations lead him reasonably to suspect' that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to investigate the circumstances that provoke suspicion. The stop and inquiry must be reasonably related in scope to the justification for their initiation. Typically, this means that the officer may ask the detainee a reasonable number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officers with probable cause to arrest him, he must then be released.

(App., *Infra*, 18) (citing *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *Terry v. Ohio, supra*, 392 U.S. 1 at 29; and *Berkemer v. McCarty*, 468 U.S. 420 (1984)). The court

said that when Thomas refused to comply with the officer's request to open his mouth but, instead, turned away and tried to leave, "Horn's suspicion then ripened into probable cause due to Thomas's furtive actions coupled with the other circumstances surrounding the incident." (App., *Infra*, 18-19).

Thomas then Petitioned to the Alabama Supreme Court for a writ of certiorari to the Alabama Court of Criminal Appeals. In that Petition, Thomas pointed out the above-cited language of the Court of Criminal Appeals, and argued that the holding violated this Court's decision in *Florida v. Royer, supra*, wherein it was held that when police, without a reasonable suspicion or probable cause, approach an individual, the individual has the right to ignore the police and go about his business, and any "refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure." Pet. for Cert. at 8. The Alabama Supreme Court issued a writ of certiorari, but subsequently quashed the writ without opinion. (App., *Infra*, 22). However, two justices, Houston and Johnstone, dissented. The dissent, authored by Justice Houston, relied upon *Royer*. *Id.* at 22-23.

ARGUMENT

In *Terry v. Ohio*, 392 U.S. 1 (1968), this Court held that an officer may, consistent with the Fourth Amendment, conduct a brief, investigatory stop when the officer has a reasonable, articulable suspicion that criminal activity is afoot. 392 U.S. at 30. Articulating precisely what "reasonable suspicion" means is not possible. *Ornelas v. U.S.* 517 U.S. 690, 695 (1996). "Reasonable suspicion" is a less demanding standard than probable cause and requires a showing considerably less than preponderance of the evidence; nevertheless, the Fourth Amendment requires at least a minimal level of objective justification for making the stop. *United States v. Sokolow*, 490 U.S. 1, 7

(1989). The officer must be able to articulate more than an inchoate and unparticularized suspicion or "hunch" of criminal activity. *Terry, supra*, at 27; *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000). In making reasonable-suspicion determinations, reviewing courts must look at the totality of the circumstances of each case to see whether the detaining officer has a particularized and objective basis for suspecting legal wrongdoing. *U.S. v. Arvizu*, 534 U.S. 266 (2002).

This Court has previously held that flight from approaching police in a high-crime area could provide a reasonable suspicion that the fleeing individual was involved in criminal activity. *Illinois v. Wardlow, supra*. The Court in *Wardlow* said that headlong flight is "the consumate act of evasion." *Wardlow* at 124. The Court was careful to distinguish headlong flight from simply "going about one's business." *Id.* at 125. (citing *Florida v. Royer*, 460 U.S. 491, 498 (1983)). In the present case, Thomas did not attempt to flee from the police. He merely attempted to walk away from Officer Horn. Under *Royer*, he was permitted to do so, and his refusal to cooperate with the police could not furnish probable cause or a reasonable suspicion of criminal activity. 460 U.S. 497-98. Therefore, any reasonable suspicion justifying Officer Horn's detention of Thomas would have to exist before Thomas turned to walk away. As this Court said in *Ornelas*:

> The principal components of a determination of reasonable suspicion or probable cause will be the events which occurred leading up to the stop or search, and then the decision whether these historical facts, viewed from the standpoint of an objectively reasonable police officer, amount to reasonable suspicion or to probable cause. The first part of the analysis involves only a determination of historical facts, but the second is a mixed question of law and fact: "[T]he historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts

> satisfy the [relevant] statutory [or constitutional] standard, or to put it another way, whether the rule of law as applied to the established facts is or is not violated."

517 U.S. at 696-97. (citing *Pullman Standard v. Swint*, 456 U.S. 273, 289, n. 19 (1982)). Accordingly, this case turns on whether the fact that Thomas had "something" in his mouth at this particular place and time provided Officer Horn with legal justification to detain Thomas. This Court has held that a determination of reasonable suspicion can often be supplied by "innocent behavior," yet in making a determination of reasonable suspicion, the relevant inquiry is not whether particular conduct is 'innocent' or 'guilty,' but the degree of suspicion that attaches to particular types of noncriminal acts. *Sokolow, supra*, 490 U.S. at 10. (probable cause analysis same as reasonable suspicion analysis).

The facts clearly show that there was absolutely nothing suspicious about the substance in Thomas's mouth. Officer Horn admitted that it could have been candy or a cough drop. Therefore, Officer Horne's suspicion was merely a hunch. In a dissenting opinion to the Alabama Supreme Court decision quashing the writ of certiorari Justice Houston, joined by Justice Johnstone, wrote:

> The United States Supreme Court in *Florida v. Royer*, 460 U.S. 491 (1983), held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the officer and go about his business. Any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.
>
> I cannot distinguish the facts in this case from those in *Florida v. Royer*. In this case, Police Officer Kenny Horn was walking to East Burdeshaw Street (which Officer Horn described as an area

> known for drug activity) when he saw several individuals (including the petitioner Anthony Charles Thomas) standing in front of a house. No one had made any complaints about Thomas, and it was not uncommon for people in the area to congregate in front of houses. Officer Horn noticed that Thomas was was moving something around in his mouth. Although Officer Horn admitted that Thomas could have had candy, chewing gum, a breath mint, or a cough drop in his mouth, Officer Horn believed that Thomas might be concealing crack cocaine in his mouth, so Officer Horn approached Thomas and began questioning him. Thomas attempted to walk away and refused to answer the questions Officer Horn asked. Officer Horn placed his hands on Thomas and asked him to stop and then to open his mouth. I do not believe that Officer Horn had justification to detain Thomas, and I would hold that any evidence gained as a result of that wrongful detention should, upon proper motion, be suppressed. It was not; therefore, I would reverse the conviction.

Opinion at 3-4. Several state courts which have confronted arrests similar to Thomas's have reached the same conclusion.

For example, In *State v. Hardy*, 577 N.W.2d 212 (Minn. Ct. App. 1998), police patrolling a high-crime area confronted Hardy, who appeared to have something in his mouth and refused to answer police questioning. When asked to open his mouth, Hardy ran. When caught by police, Hardy spit out crack cocaine. The Supreme Court of Minnesota reversed Hardy's conviction, noting that the substance in Hardy's mouth could just as likely have been gum, chewing tobacco, or food as it could have been drugs. *Hardy*, 577 N.W.2d at 216-17.

In *People v. Rainey*, 706 N.E. 2d 1062 (Ill. App. Ct.

1999), the defendant was arrested by an officer who saw him place something into his mouth. The officer "admitted that he did not know what defendant had placed in his mouth; it could have been a piece of gum for all he knew." *Id.* at 1012. However, he knew from making narcotics arrests that persons commonly hide drugs in the mouth. The Appellate Court of Illinois for the Third District reversed Rainey's conviction. It found the totality of the circumstances insufficient to provide probable cause for an arrest, as Rainey was not seen taking part in criminal activity, and there had been no complaints to police about the group or the defendant. The court held that even when Rainey turned away from the police, the officer lacked sufficient facts to justify an investigative stop until Rainey "furtively" placed something in his mouth. However, the court held, not even this "equivocal conduct" could justify a warrantless arrest. *Id.* at 1015.

In *Conwell v. Indiana*, 714 N.E.2d 764 (Ind. Ct. App. 1999), the defendant's automobile was stopped by police in a high-drug-crime area for speeding and failing to use a turn signal. The officer learned that Conwell was on probation for narcotics possession. Suspecting that Conwell was hiding drugs, and knowing that drug users often hide drugs in their mouths, the officer ordered Conwell to open his mouth and lift his tongue. Instead of complying, Conwell began to make a chewing motion. Conwell was choked and maced until he spit out cocaine. The Court of Appeals of Indiana reversed Conwell's conviction holding that the officer had no probable cause to search Conwell. 714 N.E.2d at 767.

In *Commonwealth v. Houle*,622 N.E.2d 638 (Mass. App. Ct. 1993), Houle was approached by police in a high-drug-activity area while walking toward a truck occupied by persons whom police suspected might be engaged in prostitution. During questioning, Houle appeared to have something in his mouth. Drawing on his prior experience with suspects hiding crack cocaine in the mouth, police

ordered Houle to "spit it out." Complying, Houle spit out crack cocaine. In reversing Houle's conviction, the Appeals Court of Massachusetts said although the police were entitled to approach and question Houle, the command to spit out the contents of his mouth was not supported by a reasonable suspicion, based on articulable facts and inferences, that Houle was involved in any type of criminal activity. The court observed: "[Houle] appeared to have something in his mouth. That appearance could have been caused by the presence of food, chewing gum, tobacco, or a speech defect." 622 N.E.2d at 640.

In *Royal v. Commonwealth*, 558 S.E.2d 549 (Va. Ct. App. 2002) a police officer confronted Royal in a "suspicious vehicle" which was parked at a gas station. The officer did a pat-down search of Royal and asked him to sit in the back of the police car. Royal complied. At some point later, the officer discovered Royal, still in the police car, chewing something, gasping, and trying to swallow. When asked if he was eating cocaine, Royal said he was eating a dollar bill. Knowing that dollar bills are often used to hide cocaine or marihuana, the officer asked Royal to empty his mouth. When Royal refused, the officer searched Royal's pants pocket and found drugs. *Id* at 551. The Court of Appeals of Virginia found the officer had no probable cause to search Royal, despite his belief that Royal was chewing up drugs. The court found the circumstances of Royal's detention did not provide a basis for this suspicion. The court went on to analogize the case to *Harris v. Commonwealth*, 400 S.E.2d 191 (Va. Ct. App. 1991). In *Harris*, police received information from an informant that Harris would be in possession of drugs. However, the evidence did not establish that the informant was reliable or credible. Upon stopping the car in which Harris was a passenger, police frisked Harris and found a film canister in his pocket. Harris said the canister contained film. The police officer, knowing from experience that persons hide narcotics in film canisters, searched the canister and found drugs. The Supreme Court, noting that

film canisters have legitimate uses, reversed the conviction, stating the officer's suspicions were, at best, a 'hunch.' 558 S.E.2d at 555.

These authorities are directly on point and are very persuasive in the present case. Thomas urges the Court to follow the rationale of these cases. They show that the appellate courts of other states require a police officer to have a much more substantial basis for believing a suspect had drugs in his mouth than did Officer Horn when confronting Thomas.

CONCLUSION

Under the current Alabama Supreme Court decision, Alabama citizens who live in or pass through locales deemed by the police to be high drug activity areas are no longer free to ignore the police and go about their business, a right guaranteed by this Court. The present ruling effectively permits the police, without reasonable suspicion or probable cause, to detain any citizen found in a high-crime area with anything -- candy, cough drop, food, breath mint, etc. -- in his or her mouth. This Court must reverse the decision of the Alabama Supreme Court to prevent an evisceration of the Fourth Amendment. The totality of the circumstances shows clearly that there was nothing suspicious about Thomas having something in his mouth. Moreover, if Officer Horn's conduct is legitimized, the same degree of suspicion will henceforth attach to any place in which drugs might conceivable be concealed within any "high drug activity" neighborhood. Every bulge in a pocket or a purse will provide the police with a reasonable suspicion. Accordingly, a precedent will be established

which will allow the police free reign to demand to inspect every container, purse, pocket, automobile, box, or house located in areas they deem to be high drug activity areas. Such a result cannot be permitted. Accordingly, Thomas respectfully requests this Honorable Court to issue the Writ of Certiorari to the Alabama Supreme Court, to review the decision of that court, to enter an order reversing his conviction and to order that the evidence be suppressed.

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APPENDIX

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MEMORANDUM

CR-00-1551
Houston Circuit Court CC-99-847

Anthony Charles Thomas v. State of Alabama

COBB, Judge.

Anthony Charles Thomas, the appellant, was convicted of unlawful possession of a controlled substance, crack cocaine, in violation of 13A-12-212, Ala. Code 1975.

Prior to trial, Thomas filed a motion to suppress the crack cocaine underlying his arrest. A hearing was held on the motion to suppress. At the conclusion of the hearing, the motion was denied by the trial court. Thereupon, Thomas reserved the right to appeal the ruling on the motion to suppress, withdrew his not guilty plea, and entered a plea of guilty to the charge.

Facts

Kenny Horn, a police officer for the City of Dothan, was the only witness to testify at the suppression hearing. He testified that on the night of September 4,1998, he and other officers were on foot-patrol on East Burdeshaw Street, in Dothan. He stated that Burdeshaw Street was "a high drug activity area," and that the police had "gotton

calls and complaints before about the high drug activity [in that general location]." (R. 30). Horn stated that "several arrest[s]" for drug offenses had been made in that location in the past (R. 30), and that he "had made several arrests [him]self ... in that general corner area." (R. 36). According to Horn, he and other officers parked one street over from Burdeshaw Street, and they walked "around to the front of [a] house,[1] and there were several subjects standing at the front of the house." (R. 30). According to Horn, his attention was drawn toward Thomas and he became suspicious of Thomas because Thomas "was moving something around in his mouth." (R. 30-31). According to Horn, based on his knowledge, training, and experience in narcotics investigations, "people that use or have crack-cocaine a lot of times will hide it in their mouth, because it is easily concealed there." (R. 31). Horn stated that he had "made other narcotics arrests of a similar nature." (R. 31). Horn also acknowledged that the object in Thomas's mouth could have been "any number of things," (R. 38), such as: "candy," "chewing gum," "breath mints," or "cough drops." (R. 38-39). Knowing that Thomas had something in his mouth, Horn "asked [Thomas] to stop and asked him if he had anything in his mouth, would he open his mouth." (R. 31). Horn clarified that because he knew that Thomas had something in his mouth, "[he] stopped him," from walking away and stated that:"I know I did put my hands on him." (R. 39). At this time, Thomas "spit out several pieces of what [Horn] believed to be crack-cocaine in his hand." (R. 31). When asked how close he was to Thomas when Thomas spit out what was later determined to be crack cocaine, Horn replied: "I had my hand on him. I was that close to him." (R. 32). According to Horn, he clearly saw what he thought was three crack cocaine rocks in Thomas's hand and he reached for them, but Thomas threw them against the house. The substances were recovered and after a field test reflected

[1] A house described only as a house near the intersection of Burdeshaw Street and Plant Street.

that the substances were crack cocaine, Thomas was arrested. Horn testified that he did not know that Thomas's father lived in the house next door to the house that Thomas had been standing in front of at the time of the incident. He also conceded that it would not be unusual for people to hang out in front of a house in a neighborhood.

At the conclusion of the testimony, Thomas argued that no evidence was presented to "give the police reasonable suspicion to stop and detain or search [Thomas's] mouth in this fashion ...[or] to approach him and detain him." (R. 43). Thomas argued that the fact that Horn "came up on some men that were standing in front of a house" in an area where arrests had been made before was not justification to detain any of the men. (R. 44). According to Thomas, Horn impermissibly acted on a mere "hunch" that Thomas was involved in criminal activity. Thomas requested that the cocaine obtained as evidence be suppressed for lack "of not only probable cause, but ... reasonable suspicion that ... [Thomas] was engaged in criminal activity." (R. 45).

The trial court denied the motion, stating the following:

> "... We have ... three elements here. One is the suspicious to (sic) the police action of the defendant concerning having something in his mouth. But that alone could not do it, because it could have been a cough drop. Number two, a high crime area. That alone would not do it. But I think with the looking away and turning away, in addition to all that, that would establish probable cause. Otherwise, we are authorizing drug dealers to hold cocaine in their mouth, because you are immune if you have it in your mouth."

(R. 45-46).

In response to the trial court's ruling, Thomas was

allowed to supplement his argument stating that caselaw existed stating that an individual's walking away from the police did not create reasonable suspicion because an individual may ignore the police and go "about [his] business."[2] (R. 46). Moreover, Thomas reminded the Court that Horn "testified that he had [Thomas] by the arm, and he stopped him." (R. 48). Unpersuaded by the supplement to Thomas's argument, the trial court stated the following.

> "And that [Horn had Thomas by the arm] comes into play -- of course, after the fact, it may or may not be -- it would be considered. But he had not been detained enough to prevent him from throwing the -- those items. But he may have been at least where he couldn't have easily walked away. So, there's a combination there. But I think each of the cases we have talked about have had like a couple of things. But, yet, each one of these things by themselves is not authority for the police to stop someone or even to hold them in any way. But I think the three combined -- at some point, the police have the authority to at least approach someone and detain them and question them about something that appears suspicious like that. So, I will deny the motion."

(R. 48-49).

The instant appeal followed.

Issue

Thomas contends on appeal that the trial court erred in denying his motion to suppress because the "undisputed

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[2] In support of this assertion Thomas correctly cited *Ex parte James*, 797 So. 2d 413, 417 (Ala. 2000) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000) (when " 'an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the police and go about his business.' ")

facts ... show that [Thomas's] conduct did not provide [Horn] with a reasonable suspicion to detain [Thomas], much less provide probable cause to arrest [Thomas] and order [Thomas] to empty the contents of his mouth." Thomas's brief at page 5. Contrary to the State's assertion that the cocaine was abandoned, and thus, legally seized, Thomas contends that "'[t]o fall outside of fourth amendment protection, a defendant's abandonment of evidence cannot be the product of unlawful police conduct.'" *Carlisle v. State*, 533 So. 2d 645, 648 (Ala. Crim. App. 1987)(quoting United *States v. Koessel*, 706 F.2d 271, 274 (8th Cir. 1983)). Thomas argues that the facts of the instant case clearly show that Horn seized the evidence without reasonable suspicion or probable cause. Thus, according to Thomas, the evidence was inadmissable as the product of unlawful police conduct. We disagree.

"In reviewing a trial judge's decision on a motion to suppress where the evidence is not in dispute, we apply a de I novo standard of review." *Tuohy v. State*, 776 So. 2d 896,898 (Ala. Crim. App. 1999) citing, *State v. Hill*, 690 So. 2d 1201 (Ala. 1996); *Barnes v. State*, 704 So. 2d 487 (Ala. Crim. App. 1997).

Thomas was originally approached by Horn, who was patrolling the high crime area. "'[A]n officer, without reasonable suspicion or probable cause'" may approach an individual, however, "'the individual has a right to ignore the police and go about his business.'" *Ex parte James*, 797 So. 2d 413, 417 (Ala. 2000) (quoting *Illinois v. Wardlow*, 528 U.S. 119, 124 (2000), citing in turn, *Florida v. Royer*, 460 U.S. 491, 498 (1983)). Thus, there was no constitutional violation in Horn's initial approach to Thomas. After approaching Thomas, Horn became suspicious of Thomas because Thomas was "manipulating something around in his mouth," (R. 38), and because Horn knew from his experience as a police officer that crack cocaine is often hidden in the mouth, and because they were in a high drug

crime area. "[O]fficers are not required to ignore the relevant characteristics of a location in determining whether the circumstances are sufficiently suspicious to warrant further investigation." *Ex parte James*, 797 So. 2d at 416-17 (quoting *Illinois v. Wardlow*, 528 U.S. at 124). At this time, Horn was justified in detaining Thomas for further investigation. "[W]hen a police officer has a reasonable suspicion that an individual is engaged in wrongdoing, he may temporarily detain the individual for the time necessary to confirm or deny his suspicions." *Hinton v. State*, 632 So. 2d 1345, 1349 (Ala. Crim. App. 1993) citing, *Terry v. Ohio*, 392 U.S. 1 (1968), and *United States v. Sokolow*, 490 U.S. 1, (1989).

> "'Under the Fourth Amendment, we have held, a policeman who lacks probable cause but whose "observations lead him reasonably to suspect" that a particular person has committed, is committing, or is about to commit a crime, may detain that person briefly in order to, "investigate the circumstances that provoke suspicion." *United States v. Brignoni-Ponce*, 422 U.S. 873, 881, 95 S.Ct. 2574, 2580,45 L.Ed.2d 607 (1975). "[T]he stop and inquiry must be 'reasonably related in scope to the justification for their initiation.'" *Id.*, (quoting *Terry v. Ohio*, supra, 392 U.S. [1], at 29 [(1968)], 88 S.Ct. [1868], at 1884). Typically, this means that the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions. But the detainee is not obliged to respond. And, unless the detainee's answers provide the officer with probable cause to arrest him, he must then be released.'"

Walker v. City of Mobile, 508 So. 2d 1209, 1211-12 (quoting *Berkemer v. McCarty*, 468 U.S. 420 (1984)).

In order to "obtain information confirming or dispelling his suspicions," id., Horn started talking to Thomas. Presumptively, it was at this point that Horn asked Thomas "would he open his mouth." (R. 31). Instead of responding verbally to comments from Horn, Thomas looked away from Horn "and then, he tried to walk away" from Horn. (R. 38). Horn's suspicion then ripened into probable cause due to Thomas's furtive actions coupled with the other circumstances surrounding the incident.

> "'[I]f the police see a person in possession of ... some object which is not identifiable but which, because of other circumstances, is reasonably suspected to be contraband, and then observe that person make an apparent attempt to conceal that object from police review, probable cause is then present."
>
> "W. LaFave, Search and Seizure § 3.6(d) at 58 (2d ed. 1987). See also *Lewis v. State*, 518 So. 2d 214, 218 (Ala. Cr. App. 1987)."'

Carroll v. State, 701 So. 2d 47, 50 (Ala. Crim. App. 1996) (quoting *Jones v. State*, 616 So. 2d 949, 950-51 (Ala. Crim. App. 1993)). When Thomas attempted to walk away from Horn, it became reasonable for Horn to believe that Thomas probably had crack cocaine in his mouth. "'[P]robable cause does not require certainty of criminal activity, but only probability.'" *Mcbride v. State*, 492 So. 2d 654, 658 (Ala. Crim. App. 1986) (quoting *United States v. Thompson*, 751 F.2d 300, 302 (8th Cir. 1985)). This is so because not only did Thomas's mouth appear consistent with others who concealed crack cocaine in their mouths, he was in a high drug crime area, he did not open his mouth to answer questions posed to him, he turned his head from Horn's view as he manipulated his mouth, and he began to walk away from Horn when asked if he would open his mouth.

The culmination of all these facts, as noted by the trial court, established probable cause to arrest Thomas for suspicion of possessing crack-cocaine.

From his initial encounter with Thomas, through this point, Officer Horn's conduct was proper. Thomas's abandonment of the crack cocaine, by attempting to throw it away, was not the result of improper police conduct.[3]

This case is similar to *Carroll v. State*, 701 So. 2d 47 (Ala. Crim. App. 1996). In *Carroll*, a vehicle in which Carroll was a passenger was lawfully stopped after a traffic violation. In *Carroll*, the officer's

> "observation of the appellant, a passenger in the vehicle, moving something in his mouth, failing to respond [to officer's questions], chewing action, and concealing his face, especially in light of Officer Anderson's particularized knowledge concerning narcotics, were indicia of guilt by furtive gestures. Cf., *Ex parte Tucker*, 667 So. 2d 1339 (Ala. 1995). The appellant's actions were clearly intended to dispose of an object and conceal it from the officer's view."

Carroll v. State, 701 So. 2d at 50.

Finding that probable cause to arrest Carroll existed, this Court in *Carroll*, 701 So. 2d at 50, quoting *Sibron v. New York*, 392 U.S. 40, 66-67 (1968), stated:

> ""Deliberately furtive actions and flight at the

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[3] This case is distinguishable from situations where a police officer, absent other circumstances, *commands* an individual, located in a high crime area, to open his or her mouth for police inspection simply because the individual has an object in his or her mouth. See *Commonwealth v. Houle*, 622 N.E.2d 638 (Mass. App. Ct. 1993). Though the State discusses that issue as a portion of a more complete argument in its brief, those facts are not presented in the instant case and we do not reach that question in the instant opinion.

approach of strangers or law officers are strong indicia of mens rea, and when coupled with specific knowledge on the part of the officer relating the suspect to the evidence of crime, they are proper factors to be considered in the decision to make an arrest. *Brinegar v. United States*, 338 U.S. 160, 93 L. Ed. 1879, 69 S. Ct. 1302 (1949); *Husty v. United States*, 282 U.S. 694, 75 L. Ed. 629, 51 S. Ct. 240 (1931); see *Henry v. United States*, 361 U.S. 98, 103, 4 L. Ed. 2d 134, 80 S. Ct. 168 (1959)."""

As was the officer in *Carroll*, Horn was lawfully in a location that allowed him to observe Thomas. Thomas's actions made Horn suspect that Thomas was concealing crack cocaine. The facts of the instant case support Horn's finding probable cause that Thomas was concealing crack cocaine in his mouth. The necessity of this finding was made moot when Thomas spit out the crack cocaine and it was in Horn's plain view.[4]

Horn's lawful encounter with Thomas evolved into reasonable suspicion which, in turn, evolved into probable cause to arrest as the facts, as recited above, unfolded. The evidence was derived from Officer Horn's lawful seizure of the crack cocaine; therefore, the trial court did not err in denying. the motion to suppress.

AFFIRMED.

McMillan, P.J., and Shaw, and Wise, JJ., concur. Baschab, J., concurs in the result.

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[4] A discussion of the plain view doctrine is not necessary based on the claims presented in this case.

Supreme Court of Alabama.

Ex parte Anthony Charles THOMAS.
(In re Anthony Charles Thomas
v.
State of Alabama).

1011421.

Dec. 6, 2002.

Petition for Writ of Certiorari to the Court of Criminal Appeals (Houston Circuit Court, CC-99-847; Court of Criminal Appeals, CR-00-1551).

HARWOOD, Justice.

WRIT QUASHED.

MOORE, C.J., and SEE, LYONS, BROWN, WOODALL, and STUART, JJ., concur.

HOUSTON and JOHNSTONE, JJ., dissent.

HOUSTON, Justice (dissenting).

I would reverse the judgment of the Court of Criminal Appeals; therefore, I respectfully dissent.

The United States Supreme Court in *Florida v. Royer*, 460 U.S. 491, 103 S.Ct. 1319, 75 L.Ed.2d 229 (1983), held that when an officer, without reasonable suspicion or probable cause, approaches an individual, the individual has a right to ignore the officer and go about his business. Any refusal to cooperate, without more, does not furnish the minimal level of objective justification needed for a detention or seizure.

I cannot distinguish the facts in this case from those in *Florida v. Royer*. In this case, Police Officer Kenny Horn was walking to East Burdeshaw Street (which Officer Horn described as an area known for drug activity) when he saw several individuals (including the petitioner Anthony Charles Thomas) standing in front of a house. No one had made any complaints about Thomas, and it was not uncommon for people in the area to congregate in front of houses. Officer Horn noticed that Thomas was moving something around in his mouth. Although Officer Horn admitted that Thomas could have had candy, chewing gum, a breath mint, or a cough drop in his mouth, Officer Horn believed that Thomas might be concealing crack cocaine in his mouth, so Officer Horn approached Thomas and began questioning him. Thomas attempted to walk away and refused to answer the questions Officer Horn asked. Officer Horn placed his hands on Thomas and asked him to stop and then to open his mouth. I do not believe that Officer Horn had justification to detain Thomas, and I would hold that any evidence gained as a result of that wrongful detention should, upon proper motion, be suppressed. It was not; therefore, I would reverse the conviction. See *Ex parte Tucker*, 667 So.2d 1339 (Ala.1995).

JOHNSTONE, J., concurs.